SUPREME COURT OF
JAN 7

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondents in Opposition

JOHN P. MATHIS
J. CALVIN SIMPSON
JOHN S. FICK

5072 State Building
San Francisco, California 94102

Attorneys for the Public Utilities Commission of the State of California

Dated: January 4, 1974

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement	2
1. Nature of the Subject Matter in Issue	2
2. The Proceedings Below	3
Argument	5
1. The Commission's Refund Order Directed to Petitioners Does Not Constitute Retroactive Ratemaking	5
2. The Commission's Refund Order Directed to Petitioners Does Not Unconstitutionally Confiscate Revenues	8
3. The Instant Controversy Turns on Its Own Facts	9
Conclusion	10

Table of Authorities

Page

Cases:

Appl. of Gen. Tel. Co. (1971) 72 Cal. P.U.C. 652, 92 P.U.R. 3d 224 8

Arizona Grocery Co. v. Atchison T. & S.F.R. Co. (1932) 284 U.S. 370, 76 L.Ed. 348 7

Board of Pub. Util. Comrs. v. New York Teleph. Co. (1926) 271 U.S. 23, 70 L.Ed. 808 6

City of Los Angeles v. Public Util. Com. (1972) 7 Cal. 3d 331, 497 P.2d 785 ..... 4, 5

Pacific Tel. & Tel. Co. (1971) 72 Cal. P.U.C. 327, 90 P.U.R. 3d 172 3

Pacific Tel. & Tel. Co. v. Public Util. Com. (1965) 62 Cal. 2d 634, 401 P. 2d 353 5

Constitutional Provision:

United States Constitution, Fourteenth Amendment.... 1, 6

Index to Appendix

Pub. Util. Com. Decision No. 80487 1

Pub. Util. Com. Decision No. 81367 5

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,
Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondents in Opposition

OPINIONS BELOW

The opinions of the California Public Utilities Commission (Commission), not yet reported, appear in the Appendix to the Petition (Pet. App. 125a-147a, 148a-162a). No opinion was rendered by the California Supreme Court. Instead, an order denying a petition for writ of review was issued September 6, 1973 (Pet. App. 163a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Is a public utility deprived of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution when it is required to refund revenues collected pursuant to a rate order set aside on review by the California Supreme Court and where said rate order was the subject of a partial stay order issued by that court?

CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the Fourteenth Amendment, United States Constitution is set forth in the Petition at p. 2.

STATEMENT

1. Nature of the Subject Matter in Issue.

This litigation concerns the refundability of revenues collected pursuant to a rate order subsequently overturned by the California Supreme Court. The uniqueness of the present controversy stems from Petitioners' peculiar status in the underlying proceeding which gave rise to the instant controversy.

In California rates for intrastate toll service (toll rates) and multi-message unit service (MMU rates) are established in a general rate proceeding of The Pacific Telephone and Telegraph Company (Pacific).[1] All independent telephone companies in California are made parties to the Pacific proceeding and required to adopt the toll and MMU rates authorized therein.

---

1. MMU rates apply only to Pacific and General Telephone Company of California (General).

The toll and MMU rates so established are based primarily upon the revenue requirements of Pacific and not upon the revenue requirements of Petitioners. Under this procedure all toll and MMU rates throughout California are uniform regardless of the telephone company with which a particular call may originate or terminate.

However, each company does not simply retain the toll and interchanged MMU revenues collected from its respective subscribers. Under settlement contracts entered into between Pacific and Petitioners and filed with the Commission, the total applicable revenues from all companies for toll and interchanged MMU service are pooled and, after expenses are determined and offset, the net revenues are distributed to each of the involved companies in an amount proportionate to the amount of telephone plant used by each participating company in toll or interchanged MMU service. Thus, there is no direct correlation between the rates a particular company may assess its subscribers and the revenues it may eventually receive after settlement.

2. The Proceedings Below.

On June 22, 1971 the Commission authorized Pacific to increase its rates for telephone service (*Pacific Tel. & Tel. Co.* (1971) 72 Cal.P.U.C. 327, 90 P.U.R. 3d 172). This authorization, under which the increases were to become effective July 23, 1971, was also the vehicle whereby Petitioners increased their rates for toll service and multimessage unit service.

However, prior to the rates becoming effective, the California Supreme Court issued a partial stay on July 21, 1971, wherein it was provided in part that:

> "All sums collected by Pacific . . . pursuant to the rates authorized by Decision No. 78851 shall be subject to refund in whole or in part upon order of this court should decision 77984 or 78851 be annulled by this court." (See Pet. App., 164a-165a.)

On July 9, 1972 Commission Decision No. 78851 was annulled by the California Supreme Court (*City of Los Angeles v. Public Util. Com.* (1972) 7 Cal. 3d 331, 497 P.2d 785). In its opinion the court stated:

> ". . . the entire increase of rates collected pursuant to the invalid order must be refunded." (7 Cal. 3d at 359.)

In compliance with this direction, the Commission issued Decision No. 80346 on August 8, 1972 (Pet. App. 125a-147a). Pacific and Petitioners were therein ordered to refund revenues collected over those rate levels in effect prior to July 23, 1971, less certain rate increments.[2] Pacific has made the required refunds.

Petitioners filed for a rehearing and stay of Decision No. 80346 on August 16 and 17, 1972 (Pet. App. 53a-90a). These petitions were granted by the Commission in Decision No. 80487 issued September 12, 1972 (App. 1). Rehearing was held on December 1, 1972. Thereafter, on March 27, 1973 the Commission issued Decision No. 81212 (Pet. App. 148a-162a) affirming Decision No. 80346 and dissolving the stay granted in Decision No. 80487.

A petition for writ of review before the California Supreme Court was filed by the Petitioners herein on April 26, 1973 (Pet. App. 91a-124a). On May 8, 1973 the Commission issued Decision No. 81367 which order stayed the refund provisions of the previous decisions as they applied to Petitioners (App. 5).

On September 6, 1973 the court below denied the petition for writ of review. In response to a request by Petitioners, the Commission continued the stay granted in Decision No. 81367 by Decision No. 82014 dated October 16, 1973 (Pet. App. 166a).

---

2. By companion orders issued the same date, the Commission authorized a rate increase of $55.4 million to Pacific and restated increases authorized in other decisions. These decisions included toll and MMU rates within those rates authorized to be increased.

ARGUMENT

It is essential to a proper understanding of the instant controversy that recognition be made of the distinction between (1) the toll and MMU *rates* charged by a particular telephone company and (2) the *revenue* ultimately received by that utility after settlement. It is this distinction that evidences the error of Petitioners' assertion that they are entitled to the revenues ordered by the Commission to be refunded.

1. The Commission's Refund Order Directed to Petitioners Does Not Constitute Retroactive Ratemaking.

Petitioners allege that they cannot be legally required to refund revenues collected pursuant to a rate order that was not stayed (Pet., 9-12). Said to support this challenge to the orders of the Commission and the court below are two United States Supreme Court decisions and several state court opinions.

The cases cited by Petitioners may be accepted as law but they are of no aid to the goal sought in the instant petition. Indeed, the California Supreme Court has determined, although not on constitutional grounds, that the Commission may not retroactively fix rates (*Pacific Tel. & Tel. Co. v. Public Util. Com.* (1965) 62 Cal.2d 634, 650, 401 P.2d 353; see also *City of Los Angeles v. Public Util. Com., supra* (1972) 7 Cal.3d 331, 357, 497 P.2d 785). It necessarily follows therefrom that the court below did not consider the present matter as involving retroactive ratemaking when it declined to review the subject Commission decision.

None of the cases cited by Petitioners involved the situation present herein where the revenues in question were collected through concurrences in the rates of another utility which rates were admittedly made subject to refund. Thus,

in *Board of Pub. Util. Comrs. v. New York Teleph. Co.* (1926) 271 U.S. 23, 70 L.Ed. 808, the issue was whether accumulations from past operations can be used to validate otherwise confiscatory rates for the future. The constitutional protection applicable in that controversy was described by this Court as follows:

> "The just compensation safeguarded to the utility by the 14th Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. [citations]." (271 U.S. at 31.)

Consequently, it was concluded that:

> ". . . Profits of the past cannot be used to sustain confiscatory rates for the future." (271 U.S. at 32.)

In the controversy now at hand the proceeding giving rise to the revenues claimed by Petitioners to be nonrefundable was based on the revenue requirements of Pacific. Petitioners' revenue requirements were not considered when the subject rates were authorized. Nor were they considered when the rates were annulled. They have never been an issue in the underlying proceedings concerning the toll and MMU rates.

Therefore, and contrary to the situation in *Board of Pub. Util. Comrs. v. New York Teleph. Co., supra,* the instant matter does not make use of Petitioners' past accumulations to support the subject refund order. Rather, the refund order was initiated simply because the basis for the increase was determined to have been deficient. It would indeed be anomalous if Petitioners can now retain revenues, the support for which was based on the revenue requirements of Pacific, when Pacific was under an unquestionable legal obligation to refund.

In the second of Petitioners' cited Supreme Court cases, *Arizona Grocery Co. v. Atchison, T.&S.F.R. Co.* (1932) 284 U.S. 370, 76 L.Ed. 348, the issue was whether the Interstate Commerce Commission could legislatively set rates for the future and, subsequently, judicially award reparations which, in effect, repealed its own action with retroactive effect. That situation is, of course, not present herein.

In the present controversy, the Commission did not repeal its own prior decision. Rather, it was the California Supreme Court, acting properly within its powers, that determined that the rates authorized by the Commission must be set aside. Furthermore, the Court provided beforehand that the revenues collected pursuant to the challenged rates be made subject to refund.

Petitioners are in error in asserting that the "impoundment-for-refund" order was directed only at Pacific. Understanding the nature of the monies involved, it is inescapable that the stay order issued by the Court below can only be reasonably interpreted to apply to all revenues received pursuant to the annulled decision.

As indicated hereinabove, the revenues received by Petitioners after settlement have no direct relationship to the rates Petitioners assessed against their subscribers. Notwithstanding Petitioners' argument (Pet., 11), it is not only Petitioners' filed concurrences in the rates of Pacific but the settlement contracts as well that support and justify the Commission action taken in requiring refunds. Furthermore, as previously indicated, the underlying support for the monies now required to be refunded was the revenue requirement of Pacific, and not Petitioners.

Thus, the Commission respectfully submits that the toll and MMU rates and revenues of Pacific and Petitioners

cannot logically or rationally be separated and treated differently. In light of this relationship there is simply no reasonable way in which to construe the subject stay order as limited to Pacific.

2. The Commission's Refund Order Directed to Petitioners Does Not Unconstitutionally Confiscate Revenues.

Petitioners claim that the effect of the Commission's refund order on their local exchange rates amounts to confiscation (Pet., 12-13). Thus, it is argued that the Commission itself relied upon the revenue to be derived from toll and MMU services in setting local exchange rates for the Independents after June 22, 1971.

Initially, the Commission will not disagree with the claim of Commission reliance for the purpose of this filing. It is, however, pointed out that of the twenty-eight independent telephone companies in California, only General was granted rate relief by the Commission between June 22, 1971 and August 8, 1972, the dates between which the subject rates were authorized and ordered to be refunded (*Appl. of Gen. Tel. Co.* (1971) 72 Cal.P.U.C. 652, 92 P.U.R. 3d 224).

The rate increase authorized General was issued November 22, 1971 with the rates to become effective no earlier than twenty days thereafter. Therefore, to the extent there was Commission reliance on the subject toll and MMU revenues in "other" proceedings, it was limited to one company and for a limited period of time.

Furthermore, Petitioners' attempt to insert the impact of the Commission's refund order upon their local exchange rates amounts to raising a matter that was not before the Commission when the subject rates were authorized or the court below when the subject rates were annulled. Thus,

the Commission submits that Petitioners' local exchange rates are not properly before this Honorable Court now.

Finally, it is pointed out that any refund obligation, including Pacific's, operates to trigger a recalculation of the total revenues to be received under the settlement contracts (Pet. App. 152a). If Pacific is the only company that must refund, still, there will be a corresponding reduction in the total revenues to be shared by all telephone companies in California. Consequently, while the magnitude of the impact of the refund obligations may vary depending on what parties are required to refund, an impact on Petitioners' earnings results whether they refund or not.

3. The Instant Controversy Turns on Its Own Facts.

Petitioners have cited no authority that is in direct conflict with the action taken by the Commission and the Court below. Petitioners have referred to no pending litigation wherein similar issues are involved. In short, Petitioners have made no compelling argument calling for the exercise of this Court's discretion now beyond the statement that:

> "[t]he constitutional question is one which may recur in other jurisdictions, with potentially serious effect, if the California precedent is followed, on the financial stability of the more than 1,700 companies comprising the independent telephone industry of the United States." (Pet., 7.)

The Commission respectfully submits that there is little, if any, likelihood that the circumstances involved herein will recur in the future. The fact situation that gives rise to the controversy is complicated and unique. Despite the long period of time that this nation has had the benefit of telephone service, there is no indication that anything close to the present controversy has occurred in the past.

Petitioners' statement regarding mere possibilities cannot transform the instant proceeding into an important Federal question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. MATHIS
J. CALVIN SIMPSON
JOHN S. FICK

5072 State Building
San Francisco, California 94102

Attorneys for the Public Utilities Commission of the State of California

Dated: January 4, 1974

(Appendix Follows)

Appendix

Decision No. 80487

Before the Public Utilities Commission of the State of California

In the matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.	Application No. 51774 (Filed March 17, 1970)
William M. Bennett, Consumer Spokesman, and Consumers Arise Now, and association, Complainants, vs. The Pacific Telephone and Telegraph Company, a corporation, Defendant.	Case No. 9036 (Filed April 13, 1970)
144 Spanish-Speaking Telephone Subscribers from San Francisco, Sonoma, and Imperial Counties, the Spanish Speaking/Surnamed Political Association, the Mexican-American Political Association, the Healdsburg and Windsor Local Action Councils, Complainants and (Proposed) Protestants, vs. The Pacific Telephone and Telegraph Company, a corporation, Defendant and Applicant in Proposed Rate Increase #51774.	Case No. 9042 (Filed April 2, 1970)

William M. Bennett, Consumer Spokesman, and Consumers Arise Now, an association, Complainants, vs. Western Electric Company, joining Pacific Telephone and Telegraph Company and American Telephone and Telegraph Company as Interested Parties, Defendants.	Case No. 9043 (Filed April 6, 1970)
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the Pacific Telephone and Telegraph Company.	Case No. 9044 (Filed April 7, 1970)
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of all the telephone corporations listed in Appendix A, attached hereto.	Case No. 9045 (Filed April 7, 1970)
In the Matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California in any amount necessary to offset increases in wage and salary rates.	Application No. 52794 (Filed August 6, 1971)

ORDER GRANTING REHEARING AND STAY, IN PART, OF DECISION NO. 80346 AND DENYING REHEARING AND STAY IN DECISIONS NOS. 80347 AND 80348

William M. Bennett and Consumers Arise Now, the City of Los Angeles, General Telephone Company of California,

Garret Shean and Consumers Arise Now, the City of San Diego, Continental Telephone Company, California Independent Telephone Association, and Sylvia M. Siegel have filed petitions for rehearing and stays of Decisions Nos. 80346, 80347 and 80348. The Commission has considered each and every allegation therein and is of the opinion that good cause for rehearing and a stay, in part, of Decision No. 80346, as hereafter specifically described, has been set forth.

It Is Ordered that rehearing of Decision No. 80346 is hereby granted, but limited, however, to the issue of refunds required to be made by General Telephone Company of California, Continental Telephone Company of California and all other independent telephone companies named as respondents in Case No. 9045, in ordering paragraphs 3, 4, and 5 of Decision No. 80346. In conformance with the foregoing a stay is hereby granted, until further order of this Commission, of said ordering paragraphs 3, 4, and 5. Such rehearing shall be held at such time and place and before such Commissioner and Examiner as may hereafter be designated. In all other respects rehearing and stay of Decision No. 80346 are hereby denied.

It Is Further Ordered that respondent independent telephone companies in Case No. 9045 shall continue to maintain records for possible refund purposes and to accumulate interest on such refunds at the rate of 7 percent per annum.

It Is Further Ordered that rehearing and stays of Decisions Nos. 80347 and 80348 are hereby denied.

Dated at San Francisco, California, this 12th day of September, 1972.

VERNON L. STURGEON
President

WILLIAM SYMONS, JR.

THOMAS MORAN

D. W. HOLMES

Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Decision No. 81367

Before the Public Utilities Commission of the State of California

In the Matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.	Application No. 51774
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of The Pacific Telephone and Telegraph Company.	Case No. 9044
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of certain telephone corporations.	Case No. 9045

ORDER STAYING DECISIONS

On August 8, 1972 the Commission issued Decision No. 80346 ordering, among other things, that General Telephone Company of California (General), Continental Telephone Company of California (Continental) and all other independent telephone companies made respondents in Case No. 9045 make certain refunds. Decision No. 81212, issued after rehearing, affirmed Decision No. 80346 and ordered that the determination of time for compliance with the refund orders in Decision No. 80346 was to be computed from the effective date of Decision No. 81212; i.e., March 27, 1973.

General, Continental and California Independent Telephone Association having filed with the Supreme Court a petition for writ of review and a petition for stay of Decisions Nos. 80346 and 81212, and the Commission being of the opinion that good cause exists for staying Decision No. 81212 and Ordering Paragraphs 3, 4 and 5 of Decision No. 80346;

Therefore, It Is Ordered that Decision No. 81212 and Ordering Paragraphs 3, 4 and 5 of Decision No. 80346 are hereby stayed until further order of the Commission.

Dated at San Francisco, California, this 8th day of May, 1973.

/s/ VERNON L. STURGEON
President

/s/ WILLIAM SYMONS, JR.

/s/ THOMAS MORAN

/s/ D. W. HOLMES
Commissioners

Commissioner J. P. Vukasin, Jr. being necessarily absent, did not participate. in the disposition of this proceeding.